Clause 2 provides, *inter alia,* that the assignor shall at all times hereinafter save harmless and keep the Bank indemnified. The assignor shall be solely liable for the cost of preparing the document of assignment (see clause 3), and the assignment shall be binding upon the executors, administrators or assigns of the parties (see clause 4). In clause 5 it reads:

"This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of a first legal charge over the said land in favour of the Bank."

Looking at the whole document of February 18, 1978 and bearing in mind the provision of section 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in clause 1 thereof [see Fry L.J. in *Comfort* v. *Betts (supra)* at page 740]. If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment [*Hughes* v. *Pump House Hotel Co. (supra)* and *Comfort* v. *Betts (supra)*]. We therefore agree with the judgment of the learned Judicial Commissioner but for different reason, that the appellant was not competent to maintain this action at the time when the originating summons was filed on November 17, 1982. The appeal is dismissed with costs to the respondent. The deposit of $500.00 to be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *A. Lee & Co., Jackson & Masacorale.*
corale.

CHAN KIT HONG & ANOR. v. JAYAKUMAR & ANOR.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) February 20 & May 26, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 231 of 1983]

Tort – Negligence – Claim for contribution – Need to file counterclaim – Civil Law Act, 1956, s.10.

Practice and Procedure – Action for damages for negligence – Notice of indemnity and contribution against plaintiff – Defendant should file counterclaim – R.H.C., 1980, O.15 r.2 & O.16 r.8.

In this case the first and second respondents had sued the appellants for negligence arising out of a collision between a motor car driven by the first respondent in which the second respondent was a passenger and a motor lorry driven by the first appellant. Solicitors for the appellants duly filed a notice of indemnity and contribution against the first respondent claiming to be entitled to contribution from any sum which the second respondent might recover from the appellants to the extent of the first respondent's liability. When the case come on for trial, the parties by consent agreed on liability as between the first respondent and the appellants, the former was 20% to blame. As for the second respondent, the appellants admitted a 100% liability and they were in due course ordered to pay the sum of $230,871.92 general and special damages with interest and cost. Counsel for the appellants then contended that they were liable to pay the second respondent only 80% of the total award and that the balance of 20% should be recovered by the second respondent direct from the first respondent. The learned Judge ruled against the appellants and they appealed.

Held: in this case the claim against the first respondent should have been made by counterclaim and therefore the appeal should be dismissed.

Cases referred to:

(1) *Croston* v. *Vaughan* [1938] 1 K.B. 540.
(2) *Lampert & Anor.* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 All E.R. 719.
(3) *Oli Mohamed* v. *Keith Murphy & Anor.* [1969] 2 M.L.J. 244.
(4) *Mallett & Anor.* v. *Dunn* [1949] 1 All E.R. 973.
(5) *Drinkwater & Anor.* v. *Kimber* [1952] 2 Q.B. 281.

FEDERAL COURT.

Jagjit Singh for the appellants.
Sri Ram for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the Judgment of the Court): The first and second respondents had sued the appellants for negligence arising out of a collision between motor car BAF 996 driven by the first respondent in which the second respondent was a passenger, and motor lorry BAX 1378 driven by the first appellant.

Solicitors for the appellants duly filed a notice of indemnity and contribution against the first respondent claiming to be entitled to contribution from any sum which the second respondent might recover from the appellants to the extent of first respondent's liability. This notice was in accordance with Rules of the High Court, Order 16 rule 8(1)(a).

When the action came for trial, the parties by consent agreed on liability as between the first respondent and the defendants, the former was 20 per cent to blame. As for the second respondent, the appellants admitted a 100 per cent liability, and they were in due course ordered to pay the second respondent the sum of $230,871.92 general and special damages with interest and costs.

Further arguments were then heard on appellants' claim for contribution against the first respondent. Counsel for the appellants contended that they were liable to pay to second respondent only 80 per cent of the total award and that the balance of 20 per cent must be recovered by the second respondent direct from the first respondent.

The learned Judge held that they could not.

Mr. Jagjit Singh for the appellants referred us to the case of *Croston* v. *Vaughan*[1], an authority which was apparently not cited in the court below.

There, the plaintiff was injured in an accident by the negligence of the drivers of two motor vehicles. The trial Judge held that one of the defendants Mrs. B was chiefly to blame, that she was negligent in pulling up violently and faster than a car usually does, and accordingly ordered that Mrs. B should pay two-thirds of the damages and costs and another defendant one-third.

An application was then made under section 6(2) of the Law Reform (Married Women and Tort-feasors) Act, 1935 for contribution. Subsection (2) reads:

"In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ...."

Before the Court of Appeal it was argued on behalf of Mrs. B. that the expression "proceedings for contribution" in that subsection does not mean proceedings in the action for damages, but subsequent proceedings and that therefore the Judge had no jurisdiction to entertain it and to give a decision upon it. The Court of Appeal held that the trial Judge had jurisdiction at the end of the proceedings in which it had been held that the plaintiff was entitled to recover, to entertain an application to apportion the blame between the two joint tort-feasors, and that it was not necessary that separate formal legal proceedings should be instituted for that purpose.

Section 6 of the English Act is *in pari materia* with our Civil Law Act, 1956.

In *Lampert & Anor.* v. *Eastern National Omnibus Co. Ltd.*[2] a husband and wife, Mr. & Mrs. Lampert filed an action in respect of injuries sustained by the wife as a result of a collision between a motor car driven by her husband in which she was travelling, and which was owned by her, and a motor bus, property of the defendants and driven by their servant. The court found that the accident was due to the negligence of both drivers and that each was equally at fault. It held that being the owner of the car and having delegated the driving to him, and being seated by him at the time of the accident, she had the right to control his driving and the duty to do so if he was driving unlawfully and (ii) she was thus to be considered responsible herself for one half of the damage which she had suffered.

However, counsel frankly conceded that there are authorities against him.

In *Oli Mohamed* v. *Keith Murphy & Anor.*[3] the 1st and 2nd defendants each drove their respective vehicle so negligently against one another that both vehicles thereafter collided with and caused damage to plaintiff's premises. The 1st defendant did not enter an appearance and was absent at the trial.

The court found that both drivers had been equally negligent, and that as the plaintiff was an innocent 3rd party, it was enough for him to prove negligence against the 2nd defendant even if it was not the whole of the negligence. By common law plaintiff was entitled to recover the whole of the damages awarded.

In *Mallet & Anor.* v. *Dunn*[4], the wife Mrs. Mallet was knocked down and injured by the defendant's car whilst she was walking along a

lane. Hilbury J. found that the defendant had been guilty of negligence, but that the wife had also been at fault and he reduced the award for personal injuries accordingly.

On the husband's claim for special damages in respect of medical and household expenses he held that the husband's right of action was not defeated by the wife's contributory negligence and that no reduction of this amount fell to be made under the Law Reform (Contributory Negligence) Act 1945, section 1(1), which is *in pari materia* with section 12 of our Civil Law Act, 1956 (Act 67).

However, we note that in *Mallet's* case the husband's claim was for special damages for medicine and household expenses. The husband's cause of action was personal to him and distinct.

Learned counsel for the respondents drew our attention to the case of *Drinkwater & Anor.* v. *Kimber*[5] the principles of which are we think, applicable to the present appeal.

There a motor van driven by the male plaintiff, in which the female plaintiff, his wife, was a passenger, collided with a motor car driven by the defendant. In the subsequent action the female plaintiff claimed damages for personal injuries and the male plaintiff for loss and expenses. The defendant pleaded by his counterclaim:

"If, contrary to the defendant's contention, the defendant is held to have been guilty of negligence contributing towards the happening of the matters complained of, so that he is adjudged to pay damages to the female plaintiff, the defendant will contend that he has suffered damage within the meaning of section 1 of the Law Reform (Contributory Negligence) Act, 1945, caused partly by his own fault and partly by the fault of the male plaintiff."

The defendant paid money into court in respect of the claim of the male plaintiff which was taken out in satisfaction by him, and he remained in the action as defendant to the counterclaim.

The trial judge found that responsibility for the collision lay as to two-thirds on the defendant and as to one-third on the male plaintiff. He awarded the female plaintiff £405 damages for personal injuries against the defendant, who counterclaimed for one-third of that sum £135 against the male plaintiff under section 1(1) of the Law Reform (Contributory Negligence) Act, 1945, whilst admitting that he could not recover this sum from the male plaintiff under section 6 of the Law Reform (Married Women and Tort-feasors) Act, 1935, since the two plaintiffs were husband and wife.

It was held, that the cause of action claimed was not available to the defendant under section 1(1) of the Act of 1945 and further that what the defendant claimed from the male plaintiff was not "damage" within the meaning of the subsection.

The defendant was a separate and not a joint tortfeasor. If the defendant by his counterclaim against the male plaintiff had alleged damage done to his motor car, on the judge's findings, he would have been able to recover one-third of the damage to his car. But by the counterclaim pleaded, it was not alleged that because of the male plaintiff's negligence, the defendant was caused to be negligent towards the female plaintiff nor was that proved, and so the defendant failed to establish that the male plaintiff's negligence caused the loss of which he complained. In effect, the defendant claimed to have suffered damage because he had been held liable to have caused damage. Section 1(1) of the Law Reform (Contributory Negligence) Act, 1945 did not bring into existence any new variety of claim. That subsection merely removed an obstacle to a claim made by a person who had suffered damage as the result in part of his own fault.

Since the plaintiffs in the present case under appeal are not husband and wife section 10 of our Civil Law Act (section 6 of the Law Reform (Married Women and Tort-feasors) Act, 1935) should enable the defendant to recover because it applies to any tortfeasor, joint or separate.

Mr. Sri Ram thinks that defendant should counterclaim, presumably against the first plaintiff as in *Drinkwater's case.* He was of course referring to the requirement set out in Order 16 rule 8(2) which states, "Where a defendant makes such a claim as is mentioned in paragraph 1 and that claim could be made by a counterclaim in the action, paragraph 1 should not apply in relation to that claim." Paragraph 1 refers to the notice which it issued to the plaintiffs. Since what he claims from the first plaintiff should properly be made a counterclaim under Order 15 rule 2, we agree with counsel. The decision in *Croston's case* is different because there the application for contribution is against a co-defendant.

The defendant therefore should have filed a

counterclaim. Accordingly this appeal is dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Jagjit Singh & Co.; Sri Ram, Zulkifly & Kumar.*

YAP LAI YOKE v. CHIN FOOK WAH & CONNECTED CASE

[F.C (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) March 21 & June 11, 1984]

[Kuala Lumpur – Federal Court Civil Appeals Nos. 223 & 228 of 1983]

Land Law – Encroachment on land of registered proprietor – Trespass – Qualified title – Survey – Boundaries conclusive – National Land Code, ss. 176 & 396.

In this case the respondent, the registered proprietor of land under qualified title, claimed that the owners of adjoining lots had unlawfully built extensions to their buildings thereby encroaching on the respondent's land. He brought an action for trespass and judgment was given in his favour in the High Court. The appellants appealed.

Held, dismissing the appeal: the respondent had established on the balance of probabilities that the lands upon which the appellants had trepassed was his. The wrong siting of the road which caused certain lots to have more land and others to have less was a matter between the authorities and the respective landowners.

Case referred to:

(1) *Ocean Estates Ltd.* v. *Norman Pinder* [1969] 2 A.C. 19.

FEDERAL COURT.

Ronald Khoo (*Miss Y.N. Foo* with him) for the appellant in Civil Appeal No. 223 of 1983.

S.Y. Chow for the appellant in Civil Appeal No. 228 of 1983.

V.P. Pradhan for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): The plaintiff Chin Fook Wah is the administrator of the estate of Chin Lan (deceased) the owner of Lot 1735 in the Mukim of Ulu Kelang in the State of Selangor. He is now the registered proprietor of the land under qualified title under H.S.(M) 343. The two defendants are owners of adjoining lots. Yap Lai Yoke is the owner of Lot 1738 and Yong Ah Noi @ Yong Sau Fong the owner of Lot 1739. In the course of their occupation both unlawfully built extensions to their buildings thereby encroaching on the plaintiff's land. In the case of Yap Lai Yoke the encroachment is 550 square feet and Yong Ah Noi 590 square feet. Both denied trespass and put the plaintiff to strict proof.

There is a temporary house on Lot 1735. The plaintiff's father moved into the house in 1955 and lived there until he died in 1978. Some lots were originally used for fire rehabilitation scheme. Fire victims originally moved into this area under such scheme. The plaintiff has never stayed on Lot 1735 but used to visit it every month. Hence he knew of the extensions. There was a zinc fencing separating the lots. The zinc fencing is still standing there. Since his father's death he has rented out the house. He wanted to build a concrete house on the land but was prevented from doing so because of the encroachments.

In 1979 plaintiff instructed a licensed surveyor Cheong Fook Hoe (P.W.2) to carry out a survey. As a result of the survey he learned of the extent of the encroachments. On November 30, 1979 he wrote to the Majlis Daerah Gombak asking whether any approval was given for the building of the extensions to both houses on Lots 1738 and 1739. The reply was in the negative. So, on December 30, 1979 he wrote to both defendants in similar terms notifying them of the encroachments and asking them to remove the encroachments.

The area of encroachment calculated by P.W.2 was accepted by the defendants in documents marked "D" and "E". At page 75 of the Appeal Record in Federal Court Civil Appeal No. 223 of 1983 shows the extent of encroachments in these words:–

"1. The concrete house on Lot 1739 has encroached about 6 to 6½ feet into Lot 1735. The area of the building encroaching is about 200 sq. ft.

The fencing has encroached about 11 feet and the area taken out of Lot 1735 is about 555 sq. ft.

2. The concrete building on Lot 1738 has encroached about 8½ to 9½ feet into Lot 1735. The area of the building encroaching is about 223 sq. ft. The toilet and bathroom which is about 55 sq. ft. has entirely encroached onto Lot 1735.